IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 221

PHILCO CORPORATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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MISCELLANEOUS

U. S. Supreme Court Rule 19 11

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Petitioner, Philco Corporation, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on April 17, 1959.

CITATIONS TO OPINIONS OR DECISION BELOW

There was no opinion rendered by the court below. The single order of the Court of Claims granting the respondent's motion for judgment on the pleadings in

this case, and in two other cases involving different factual situations (R. 87 and Appendix A hereto, *infra*, p. 1a), is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C., Section 1255(1).

QUESTIONS PRESENTED

The Court of Claims summarily granted respondent's motion for judgment on the pleadings thus admitting the allegations of the petitioner. The petitioner had alleged that by rebates or allowances it had readjusted its prices on certain articles which proved to be defective during a warranty period. The allegations were expressed in the exact terms of the statute which permits excise tax refunds where a price is so readjusted.

The questions are therefore:

1. If, admittedly, a price is readjusted by reason of a rebate or allowance is it a "price . . . readjusted by reason of . . . a rebate or allowance" under the statute, when the readjustment is to satisfy the purchaser of a defective article?

2. Has the Court of Claims by a negative answer to question 1 deprived the petitioner of property without due process?

STATUTE INVOLVED

The statutory provision involved is Section 3443 (a)(2) of the Internal Revenue Code of 1939, (26 U.S.C. § 3443(a)(2) (1952)), originally enacted as Section 621 of the Revenue Act of 1932, 47 Stat. 169, which reads:

"SEC. 3443. CREDITS AND REFUNDS.

"(a) A credit against tax under this chapter, or a refund, may be allowed or made—

* * * * *

"(2) to any person who has paid tax under this chapter with respect to an article, when the price on which the tax was based is readjusted by reason of return or repossession of the article or a covering or container, or by a bona fide discount, rebate, or allowance; in the amount of that part of the tax proportionate to the part of the price which is refunded or credited.

* * * * *"

STATEMENT

After disallowance of claims for refund by the Commissioner of Internal Revenue, the petitioner, on February 29, 1956, filed a petition in the Court of Claims for recovery of excessive tax payments. An amended petition was filed on March 16, 1956. The suit was based upon Sections 3443(a)(2) and 3443(b) of the Internal Revenue Code of 1939, the relevant portions of which provide:

> "A credit against tax . . . or a refund, may be allowed . . . to any person who has paid tax under this chapter with respect to an article, when the price on which the tax was based is readjusted by reason of . . . a bona fide . . . allowance . . ."

To show that it came within the terms of the statute, the petitioner alleged that "by payment to its vendees or by giving them credits" (R. 2, ¶5, R. 4, ¶11) it expended amounts which "constituted bona fide discounts, rebates or allowances within the meaning of Section 3443(a)(2) of the Internal Revenue Code of 1939." (R. 3, ¶7, R. 4, ¶13).

The respondent denied these critical allegations in its answer filed April 30, 1956. (R. 14, ¶¶5, 7, R. 15, ¶¶11, 13).

On November 13, 1958, the respondent filed a motion for judgment on the pleadings and supporting brief,

> "on the grounds that the pleadings fail to state a claim upon which relief can be granted in view of the Court's decisions in *General Motors Corp., Frigidaire Div.* v. *United States*, 147 F. Supp. 739 and 163 F. Supp. 854, decided respectively on January 16, 1957 and July 16, 1958, certiorari denied October 20, 1958, and *Ford Motor Co.* v. *United States*, 156 F. Supp. 554, certiorari denied, October 20, 1958 . . . ." (R. 21-22).

In opposing the respondent's motion on January 14, 1959 (R. 29-72), the petitioner pointed out that the court's decisions in *General Motors Corp., Frigidaire Div.* v. *United States*[1] and *Ford Motor Co.* v. *United States*[2] were based upon a determination that those manufacturers had incurred expense for "correcting defects" and that their purchasers did not get back any part of the purchase price. (R. 41).[3] This petitioner, however, did not repair defective articles and did, in fact, return a part of the purchase price to the vendees. The petitioner also filed an affidavit (R. 57-

[1] 147 F. Supp. 739 (1957), 163 F. Supp. 854, (1958), *certiorari denied*, 358 U.S. 866 (1958), referred to hereinafter as *General Motors*.

[2] 156 F. Supp. 554, (1957), *certiorari denied*, 358 U.S. 864 (1958), referred to hereinafter as *Ford*.

[3] For similar reasons, petitioner does not rely upon the decision of the Court of Claims in General Motors Corp., Frigidaire Div. v. United States, 128 Ct. Cl. 465, 121 F. Supp. 932 (1954), *certiorari denied*, 348 U.S. 942 (1955), which also involved the expenses of repair rather than price allowances to vendees.

62) setting forth the character of the evidence it would present to substantiate its allegations and prove that it had made "bona fide discounts, rebates or allowances" within the terms of the statute. (R. 58-59).

In a reply brief (R. 73-86) the respondent continued to deny the specific facts upon which the petitioner was relying. Although the petition and the affidavit clearly stated that it was the petitioner's practice to return a part of the purchase price of an article to its vendees in the event the article was defective, the respondent claimed that the petitioner "did not refund or credit any part of the prices for which the products were sold by it." (R. 82).

After oral argument, the Court of Claims on April 17, 1959, issued its order granting the motion for judgment on the pleadings, basing it upon the decisions of the court in the *General Motors* and *Ford* cases. (R. 87)[1]

REASONS FOR GRANTING THE WRIT

I.

In Refusing to Hear Proof That Petitioner Is Entitled to Recover Under the Statute the Court Has Arbitrarily and Summarily Denied the Petitioner Due Process of Law

The statutory provision involved is a re-enactment of Section 621 of the Revenue Act of 1932. The plain language of the statute is to allow "any person" to recover a pro rata share of taxes paid on the sale of an article "when the price on which the tax is based is readjusted . . . by a bona fide discount, rebate, or allowance." The Congressional purpose is reasonable

[1] The order, as shown in App. A, p. 1a, *infra*, disposed not only of the petitioner's case, but two other cases involving materially different allegations and facts.

and logical. Since the tax involved is based upon the actual price received for an article, Congress has provided for a reduction in the tax previously paid on the sales price of an article when that price is subsequently reduced. The legislative history pertaining to the Revenue Act of 1932 indicates beyond question that the Congress intended the broadly phrased statutory provision here involved to operate liberally, inclusively, and without discrimination.[5]

The Court of Claims, however, has, in effect, created a conclusive presumption that a person cannot recover under the statute where a price adjustment is made because a purchased article has proved defective and therefore worth less than the original sales price. This concern for the motive underlying the price adjustment is unwarranted since the statute plainly includes all price adjustments effected by a bona fide discount, rebate or allowance regardless of motive. The establishment of a class of persons to whom recovery under the statute must be automatically denied is therefore an arbitrary action on the part of the court. It prevents a person from proving that he is entitled to relief. It is so obviously a denial of due process that it would seem to require little comment.

The precise rationale of the court's order is impossible to determine from the record since an opinion was not rendered in this case. For its authority, the order merely cited the court's prior *General Motors* and *Ford* decisions. Petitioner's allegations and proffer of proof, however, clearly showed that its facts differed materially from those found to exist in the *General Motors* and *Ford* cases. In those two cases

[5] This detailed legislative history, conclusively evidencing intent, is shown in Appendix B hereto, *infra*, pp. 1a-4a.

the Court of Claims had found as a fact that no portion of the price had been returned to the vendees by the claimants, but that the claimants retained the full price and repaired any defects.

> "In each case [General Motors and Ford] the expenditure by the manufacturer was for *correcting* a defect. It was not a readjustment of the sales price.
>
> * * * * *
>
> ". . . the . . . [purchaser] got no more than he had paid for, to wit, a sound article; he certainly did not get back any part of the purchase price." (Emphasis supplied)[8]

The petitioner, on the other hand, alleged and proffered proof that it does in fact return a part of the price to its vendee in case an article proves to be defective. It specifically contended that it did not repair the defective article. Contrary to the situation in the *General Motors* and *Ford* cases, the price ultimately received by the petitioner for defective articles was less than the price received for sound articles.

In view of the reliance of the court below on the *General Motors* and *Ford* decisions the issue here is whether there is *any* similarity between those cases and the instant case. The *single* factual similarity is that each of these cases involved defective articles. In refusing the petitioner the right to prove its allegations on the basis of those prior decisions, the Court of Claims has determined that this single similarity prevents recovery. There can be no other inference from the order.

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[8] Ford Motor Company v. United States, *supra*, 156 F. Supp. 554, 555 (1957).

The Court of Claims has therefore contravened the explicit words of the statute, and its legislative history, by conclusively presuming that a price is not readjusted where refunds readjusting the price were made because of defects in the articles sold.

This irrebutable presumption has become a substitute for proof that the petitioner gave bona fide discounts, rebates, or allowances under the terms of the statute. "This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause. . . ."[7] Certainly the court cannot do that which the legislature is prohibited from doing, for "a constitutional prohibition cannot be transgressed indirectly by the creation of a . . . presumption any more than it can be violated by direct enactment".[8]

It is apparent that the Congress did not intend to provide for tax recoveries in the event of all price adjustments *except* those where defective articles are involved. To construe the statute in such a manner "is to disregard the plain language and the plain intent of the act. For . . . [a] court to do so would be to enact a law under the pretense of construing one, and thus pronounce itself guilty of a flagrant perversion of the judicial power."[9]

The *Heiner* v. *Donnan* case, and the cases therein cited and discussed, have established beyond question that in tax as well as other matters the right to present evidence in support of allegations essential to a proper

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[7] Heiner v. Donnan, 285 U.S. 312, 329, 52 S. Ct. 358, 362 (1932); and see Schlesinger v. Wisconsin, 270 U.S. 230, 46 S. Ct. 260 (1926).

[8] *Ibid.*

[9] *Id.*, at 331; 52 S. Ct. at 363.

decision is a constitutional right. As such, it cannot be destroyed either by the legislature or the courts.

The effect of the order of the court is to levy the excise tax on monies received, but not retained. "Such an exaction is not taxation but spoliation."[10] It results in discrimination which is so arbitrary and capricious as to amount to a denial of due process of law.

II.

The Impact of the Excise Tax Laws Upon the Nation's Entire Economy Demands That the Arbitrary Application Thereof by the Court of Claims be Reviewed by This Court

The type of excise tax question here involved has a widespread importance. Unlike the income tax, which can only serve to *deplete* the income interests of proprietors or stockholders, the excise tax can *destroy* all income and profits, and, indeed, capital assets. In any of the highly competitive industries essential to our economy—for example, the electronics industry—the payment of excessive excise taxes can impose a severe competitive handicap upon the manufacturer or importer. Price increases, detrimental to sales volume, often cannot absorb the excessive tax burden. In many instances the tax rate exceeds the gross margin of profit on the sale.

Since the tax burden is reflected in the price and since price is material to purchasers as well as sellers, excise tax questions are important to the wholesalers, dealers, and the general public. Faulty application of the excise tax laws, either by the administrative personnel or the courts, affects the entire economy of our country. The effect is two-fold: (1) Higher or lower

[10] Heimer v. Donnan, 285 U.S. 312 at 327.

prices; and (2) Increased or reduced sources of supply. These are direct effects, as compared to the indirect or consequential effects of most other taxes.

These direct effects on our economy demand that the excise tax laws be construed carefully and properly — not summarily. To this end, the Court should grant certiorari and review the instant case as one of material importance to the entire economy.

III.

The Departure From the Accepted and Usual Course of Judicial Proceedings Demands the Exercise of This Court's Supervisory Jurisdiction

This case presents a combination of features each of which calls for an exercise of this Court's power of supervision over the lower courts. This Court's responsibility for the proper functioning of the federal judiciary is particularly important with respect to the Court of Claims since its decisions are not subject to the ordinary appellate review.

Here the court has summarily granted judgment to the respondent despite the fact that the burden was on the respondent to demonstrate beyond doubt that no genuine issue of fact was present.[11] In a summary proceeding it is, of course, no part of the court's function to decide issues of fact, but only to determine whether there is an issue of fact to be tried.[12]

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[11] Heyward v. Public Housing Administration, 238 F. 2d 689, 696 (5th Cir. 1956); Hunter v. Mitchell, 180 F. 2d 763, 764, 86 U.S. App. D.C. 121, 122 (1950), and cases cited therein; Dewey v. Clark, 180 F. 2d 766, 772, 86 U.S. App. D.C. 137, 143 (1950).

[12] Byrnes v. Mutual Life Ins. Co. of N.Y., 217 F. 2d 497 (9th Cir. 1954), *certiorari denied* 348 U.S. 971 (1955).

As pointed out above, an issue of fact clearly was present in this case, namely whether the petitioner did readjust the price of certain articles by way of a bona fide rebate or allowance. In summarily refusing to permit the petitioner to prove this allegation of fact the Court of Claims has departed "from the accepted and usual course of judicial proceedings"[13] to such an extent that this Court's review is justified, if not, indeed, compelled.

The Court of Claims' action in this case is of special importance since it has denied the petitioner basic rights guaranteed by the Constitution. To allow such a result to remain unchallenged will leave on the books a modified statute which is "wholly arbitrary"[14] and contrary to the intent of Congress.

In effect, it makes recovery under Section 3443(a)(2) completely discretionary with the Court of Claims, dependent on whether the Court approves of the *reasons* for the price adjustment.[15] The *fact* that the price of an article has been adjusted becomes of no decisional importance. One might well wonder if the Court of Claims will approve *any* reason for a price adjustment. If this be so, it amounts to a virtual repeal of the statute and a usurpation of legislative power by the judiciary. If it is permitted to approve some reasons for price adjustments, but not others, as in this case, the result is arbitrary and discriminatory and even beyond the power of congress to enact.

[13] U.S. Sup. Ct. Rule 19.

[14] Schlesinger v. United States, 270 U.S. at 239.

[15] Of course, motive is immaterial in a price adjustment situation. See Helvering v. American Dental Co., 318 U.S. 322, 331, 63 S. Ct. 577, 582 (1943).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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